large sums without any further check. After the agreement was concluded, apparently without any further information than had originally been obtained from second appellant and the Mines Department records, a surveyor was sent out to look for a bench mark and immediately the error was discovered.

This record of events shows beyond all doubt that this substantial company had the facilities for checking the position at any time and that its executive officers realised the risk that was involved in taking the unusual course of entering into a contract on these terms without a further check. It is plain that the company "had the means of discovering the truth with ordinary diligence" to quote the words of section 19 of the Contracts Ordinance, 1950. It is equally plain that the circumstances, involving these large payments, called for the exercise of more than ordinary caution. The truth of the matter is that the respondent company's officers, fully appreciating the danger, decided not to make use of the facilities available, but to take the risk.

It was contended for the company that it was stampeded into this decision by the talk of the offer from Japanese sources. That talk may have persuaded them to take the risk, but they still decided to take it. There has been no allegation in the pleadings that it was this aspect that induced the company to enter into this agreement. Obviously, it was the result of the inspection that led the company's officers to this decision, and they did have the means of discovering with ordinary diligence the truth concerning this aspect, even though, in consequence of the fear of losing these mining rights to Japanese competitors, they decided to proceed without using the means available to them.

For these reasons, in my judgment, the contracts entered into between the respondent company and the appellants were not voidable because of misrepresentation and the company's claims against both appellants entirely fail.

In view of this conclusion, it is not strictly necessary for me to decide whether second appellant was acting as the agent of first appellant or not. I feel bound to observe, however, that, on this issue also, the onus lay on the company and that the more cogent evidence (the existing relationship between the company and second appellant, as shown by Exhibit D.3, and the payment of the latter's commission by the company) points to him being the agent of the company. These features carry more weight in my opinion than the features pointed to on behalf of the respondent company, viz. that the first appellant, on the occasion of the signing of the contract, seemed "at home" in the second appellant's house and that the latter was not a paid employee or retainer of the company. He made it clear to Cochrane at an early stage of negotiation that the company must pay him, as he was getting no reward from the first appellant. On this evidence I do not consider that the respondent company discharged the onus that lay on it to establish on a balance of probabilities that the second appellant was the agent of the first appellant in negotiating this contract.

I would allow this appeal, set aside the judgment of the court below and substitute judgment in favour of the appellants on all claims with costs to the appellants both on the appeal and in the court below.

Tan Ah Tah F.J. concurred.

Appeal allowed.

Solicitors: *R. R. Chelliah Bros.; Richard Talalla; Skrine & Co.*

GOH SENG THIAM v. LEE & THE CEYLON SPORTS CLUB

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) November 19, 1964]

[Singapore — Federal Civil Appeal No. 30 of 1964]

Contract — Building contract — Construction of club house — Delay in completing construction — Novation of contract — Guarantee — Amendment of statement of defence — Inaccurate affidavit of documents — Procedure.

Practice and Procedure — Amendment of statement of defence.

The Ceylon Sports Club, the 2nd respondents, entered into a contract on November 25, 1952 in writing with the British Construction Company for the construction of a club house at Balestier Road, Singapore. The club engaged Lee, the 1st respondent, as their architect. There was delay in completing the construction and Lee gave notice to the British Construction Company, to cease work on the contract. The appellant claimed that there was a novation of the contract with the consent of the Ceylon Sports Club and the British Construction Company; that thereby the British Construction Company was to be discharged from further liability under the contract and the appellant was to be substituted for them. It was also claimed that the first respondent had agreed to make all payments due to the appellant on the default of the second respondents. The defence denied the alleged novation and the agreement to make the payments due and alleged that when the British Construction Company ceased work under their contract, various contractors and workmen were engaged to complete the work which was outstanding; and that the appellant was engaged by the first respondent to do certain work for which he was paid in full. The trial judge held that there was no novation and dismissed the claim. The appellant appealed. The main ground of appeal was that the trial judge was wrong in holding that there had been no novation. Two questions of procedure were also raised on the appeal. It was alleged that the trial judge had erred in law in allowing the amendment of the defence after commencement of the trial; and in admitting a document not disclosed in the affidavit of documents, especially when an application for an adjournment to consider, evaluate and challenge such evidence was refused.

Held: (1) on the facts there was no novation of the contract;;

(2) in this case the appellate court saw no reason to interfere with the discretion of the judge in allowing the late amendment of the statement of defence and in refusing to grant an application for adjournment after an undisclosed document was produced and admitted in court.

FEDERAL COURT.

K. S. Chung for the appellant.

A. P. Godwin for the respondents.

Wylie C.J. (Borneo) (delivering oral judgment): I refer first to the two questions of procedure raised in the grounds of appeal. The late amendment of the statement of defence indicates a complete disregard of rules of procedure designed to give fair notice to the other side of the case to be met and to enable the court to determine what the real issues are. The mere admission of counsel to the judge of the obvious fact that the application for amendment was late, with no adequate explanation given either in that court or in this court for a delay of two years, is, I trust, not a fair average example of the attitude of the profession in Singapore towards compliance with rules of court. It is indeed fortunate that in this instance no penalty or disadvantage resulted to the clients from this measure of attention — if that is an appropriate word to use in the circumstances — given to their interests by their legal advisers. However, the judge hardly had any option but to allow an amendment which was necessary to enable the real issues to be contested, even though an important witness as to novation had already been heard. He has exercised his discretion to that effect and no specific detriment or prejudice has been shown to have resulted to the appellant from this inordinate delay. Consequently there is nothing that this court can do in regard to ground one.

The other question of procedure also discloses an extremely unsatisfactory state of affairs. An affidavit of documents was sworn that was not accurate. Some time afterwards the deponent discovered Exhibit D. 7. Two years after discovering it he produced it to his legal adviser, apparently only the day before it was sprung on the other side in court. The trial judge exercised his discretion against granting an application for adjournment in circumstances which have been thoroughly canvassed in this court. I doubt whether I should have refused the application in the circumstances, although that is a matter for the discretion of the particular judge. There was some little time for the plaintiff to consider this new evidence before the hearing ended and nothing has been put before this court to indicate that the plaintiff lost an opportunity to put before the court anything that may have had a bearing on the result of this litigation. Presumably if anything of this nature had been discovered in the meantime, this court would have been informed of it. Consequently, even if this had been a case where this court should interfere with the exercise of his discretion by the judge, no useful purpose would be accomplished by doing this and the appeal cannot be allowed on this point.

The substantial ground of appeal is that the judge was in error in holding there had been no novation. The judge accepted the evidence of Lee in preference to that of the appellant. He gave his reasons and I cannot see any reason why this court should interfere with that conclusion on a question of credibility. Indeed, it seems unbelievable that Lee would have concluded with appellant an arrangement which would have obliged the latter to complete the building only some time after the official opening. That factor, combined with the club's minutes and statements of account and their letter of 17th March, all indicate that no final arrangement involving novation was concluded between appellant and the club, either directly, or by Lee as the agent of the club. It is also difficult to believe that an architect in Lee's position in these negotiations would not show the club's letter of 17th March to appellant. For not only does it raise again the question of the date of completion. It also contains a refusal to pay to appellant the amount for extras which the latter had stipulated for in his letter of 15th March to the British Construction Co. Consequently, I can find nothing unreasonable in the judge accepting Lee's evidence to the effect that this letter was shown to appellant and that no agreement could be concluded because of the time factor.

Stress was laid on correspondence, chiefly letters written by appellant and the British Construction Co. to one another and to Lee, but this correspondence is not necessarily inconsistent with the conclusion that there was no final agreement for novation between all three parties. For they are equally consistent with the view that proposals were being put up to be placed before the club — proposals that two of the three parties may have already agreed upon — and the letter of 17th March from the club is only consistent with this view of the earlier correspondence.

Stress was also laid on the payments made to appellant. In different circumstances, this would have been strong evidence of novation, for example, if appellant had done no earlier work on this building. But the circumstances were that, although the British Construction Co. had the only legal claim on the club for these moneys, the appellant had a legal claim on that

company for an amount equal to most of the contract money because he had actually done all the work under the contract. It was therefore to be expected that he would receive these moneys whether there was novation, or some other arrangement for completion of the work. In these circumstances, the receipt by him of these moneys does not outweigh all the other evidence I have referred to which led to the conclusion that there was no novation.

For these reasons in my judgment this appeal fails and should be dismissed with costs.

Barakbah C.J. (Malaya) and **Tan Ah Tah F.J.** concurred.

Appeal dismissed.

Solicitors: *Hilborne, Chung & Co.*; *Donaldson & Burkinshaw.*

RE PEACE INSURANCE CO. LTD.

[F.C. (Barakbah Ag.L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) November 19, 1964]

[K.L. — Federal Court Civil Appeal No. 33 of 1964]

Companies — Allegation that director is guilty of misfeasance and breach of trust — Director only liable if it is shown that company was entitled to recover amount sought to be recovered — Companies Ordinance, 1940, ss. 137 and 267.

This was an appeal against part of a judgment of the High Court in Malaya ([1964] M.L.J. 232) made on the application of the liquidator of the Peace Insurance Company under section 267 of the Companies Ordinance for *inter alia* a declaration that the appellants had been guilty of misfeasance and breach of trust in relation to the company by procuring and permitting to be paid to themselves for the sale of the shares in the company the sum of $744,000 out of the funds belonging to the company. The declaration was granted by the High Court and on appeal it was contended that the learned judge was wrong in law in coming to the conclusion that a sum of $196,746.44 was part of the moneys of the company or moneys had and received for the use of the company. This sum had been received by one Foo Ah Soo, from prospective agents who had relied on his representation to them that he was about to acquire the entire shares of the company and on his promise that the company would enter into agency agreements to canvass insurance business with each of them. The sums collected from the agents was paid by Foo Ah Soo as purchase price of the shares in the company allotted to him. Subsequently Foo Ah Soo and two other directors bought up the entire share issue of the company for $744,000 in cash paid to the appellants. Of this sum $547,253.56 (including the $196,746.44) came out of the funds of the company.

Held: (1) to make a person liable under section 267(1) of the Companies Ordinance in respect of moneys received by him it must be shown that the company was entitled to recover the amount sought to be recovered from that person at the time he received it;

(2) as the sum of $196,746.44 was never part of the money of the company nor moneys which the company could recover from the appellants as moneys had and received by the appellants to the use of the company, the appellants could not be held liable under section 267(1) of the Companies Ordinance in respect of such sum.

Case referred to:—

(1) *Re Sale of Hotel and Botanical Gardens Ltd., ex parte Hesketh* (1898) 78 L.T. 368.

FEDERAL COURT.

Yong Pung-How for the appellant.

Y. S. Chong for the respondent.

Wee Chong Jin C.J. (Singapore): This is an appeal against the judgment of Ong J. of the High Court in Malaya made on an application by the liquidator of the Peace Insurance Co., Ltd. under section 267 of the Companies Ordinance 1940/46 for *inter alia* a declaration that the appellants and each of them have been guilty of misfeasance and breach of trust in relation to the company by (a) authorising and/or procuring a loan of $40,000 to themselves contrary to section 137 of the Ordinance and (b) procuring or permitting to be paid to themselves for the sale of the shares in the said company the total sum of $744,000 out of the funds belonging to the company.

Ong J. in respect of (a) above declared that the appellants and each of them had been guilty of misfeasance and breach of trust in relation to the company by procuring, authorising or permitting the loan to themselves as directors amounting to $37,500 contrary to section 137 of the Ordinance and in respect of (b) declared that the appellants and each of them had been guilty of misfeasance and breach of trust in relation to the company in procuring or permitting to be paid to themselves for the sale of 245 shares in the company the total sum of $744,000 out of funds belonging to the company.

The appellants are now appealing against the declaration made in respect of (b) but only limited to the sum of $196,746.44, having abandoned at the hearing of the appeal the grounds of appeal which relate to the sum of $547,253.56 which it is now conceded were moneys of the company so misapplied as to make the appellants liable under section 267.

At the hearing of the appeal counsel for the appellants conceded that the findings of fact which are contained in the judgment of Ong J. cannot be now disputed and are correct. It is however contended on the facts as found by the trial judge, he was wrong in law in coming to the conclusion that the sum of $196,746.44 was part of the moneys of the company or moneys had and received for the use of the company.

The facts as found by the trial judge were these. The company was a life insurance company which was compulsorily wound up under the Life Assurance Companies (Compulsory